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In The

Supreme Court of the United States

October Term, 1990

RONALD ALLEN HARMELIN,

Petitioner,

vs.

STATE OF MICHIGAN,

Respondent.

On Writ Of Certiorari
To The Court Of Appeals Of Michigan

BRIEF OF RESPONDENT

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QUESTION PRESENTED

1. WHETHER A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR POSSESSION OF OVER 650 GRAMS OF PURE COCAINE VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT?

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STATEMENT OF THE CASE

For the most part, Respondent accepts Petitioner's Statement of the Case. It should be added, however, that the 672.5 grams of cocaine involved were pure with no dilutants. (J.A., p. 2, Chemist's Laboratory Report)

As to Petitioner's professional status, the presentence report indicated that the Oakland County Narcotics Enforcement Team (N.E.T.) and Oak Park Police described Petitioner "as a large-scale drug dealer, delivering down to mid-level dealers." The street price of the confiscated cocaine was estimated as between $67,000 and $100,000. (J.A., p. 9) Petitioner states there was no offer of proof as to his alleged drug-trafficking. (Petitioner's brief, p. 4) However, as Petitioner admits, the contents of the presentence report was not challenged at the time of sentencing. Petitioner's trial counsel indicated: "I have had an opportunity to go through the presentence report. As to the factual allegations only, I have no difficulty with them. I believe them to be accurate." (J.A., pp. 14-15)

In the presentence report, Petitioner denied "drug trafficking." He claimed he earned $500 to $800 a week

playing pool. Petitioner retained his attorney for $15,000, paid for by an associate of Petitioner's, according to police investigation. (J.A., pp. 12-13)

SUMMARY OF THE ARGUMENT

Petitioner makes the emotional argument that Michigan's statutorily-mandated sentence of life in prison without parole constitutes cruel and unusual punishment in violation of the US Const, Amend VIII. Respondent submits that given that Petitioner was convicted of possessing 672.5 grams of pure cocaine worth between $67,000 to $100,000, Petitioner cannot complain of the harshness of the sentence he received. Drug-trafficking is one of the greatest and gravest dangers facing the United States. Michigan's mandatory penalty for those dealing in large quantities of drugs is not grossly disproportionate as a weapon in the national war on drugs. That Michigan's penalty may be one of the harshest in the nation is beside the point under the doctrine of federalism.

I. A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR POSSESSION OF OVER 650 GRAMS OF PURE COCAINE DOES NOT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT.

A. Michigan's State Interest In Fighting Drugs

On February 26, 1987, Petitioner was found guilty by the trial judge of possession of over 650 grams of a substance containing cocaine, in violation of MCL 333.7403(2)(i) and of possession of a firearm during the

commission of a felony in violation of MCL 750.227b. On April 30, 1987, he was sentenced to a mandatory term of imprisonment of two years on the felony-firearm charge and to a consecutive mandatory life term on the cocaine charge.

The crimes in question occurred on May 12, 1986. Until amendments which became effective March 30, 1988, MCL 333.7403 provided:

> Sec. 7403. (1) A person shall not knowingly or intentionally possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.
>
> (2) A person who violates this section as to:
>
> (a) A controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv), and;
>
> (i) Which is in an amount of 650 grams or more of any mixture containing that substance is guilty of a felony and shall be imprisoned for life.
>
> (ii) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.
>
> (iii) Which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that substance is guilty of a felony and shall be either imprisoned for not less than 10 years nor more than 20 years or placed on probation for life.

(iv) Which is in an amount of less than 50 grams of any mixture containing that substance is guilty of a felony, punishable by imprisonment for not more than 4 years, or by a fine of not more than $2,000.00, or both.

(b) A controlled substance classified in schedule 1, 2, 3, or 4, except a controlled substance classified in schedule 1 for which a penalty is prescribed in subdivision (a), (c), or (d), is guilty of a felony, punishable by imprisonment for not more than 2 years, or a fine of not more than $2,000.00, or both.

(c) Lysergic Acid Diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, or a controlled substance classified in schedule 5, is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

(d) Marihuana, is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

MCL 333.7403 codified section 7403 of Mich Public Act 368 of 1978 which became effective September 30, 1978. MCL 333.7214(a)(iv) codified section 7214(a)(iv) of Act 368 and specifically encompassed cocaine.

Also part of Mich Public Act 368 was section 7401 which prohibited the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance. The penalties were the same as for possessing schedule 1 and 2 controlled substances in amounts greater than 50 grams. This section became codified as MCL 333.7401 and included in section 7401(3) a provision

for no parole during the mandatory terms. MCL 333.7401 provided:

> Sec. 7401. (1) Except as authorized by this article, a person shall not manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.
>
> (2) A person who violates this section as to:
>
> (a) A controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv) and:
>
> (i) Which is in an amount of 650 grams or more of any mixture containing that substance is guilty of a felony and shall be imprisoned for life.
>
> (ii) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.
>
> (iii) Which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that substance is guilty of a felony and shall be either imprisoned for not less than 10 years nor more than 20 years or placed on probation for life.
>
> (iv) Which is in an amount less than 50 grams of any mixture containing that substance is guilty of a felony and may be imprisoned for not more than 20 years, or fined not more than $25,000.00, or both.

(b) Any other controlled substance classified in schedule 1, 2, or 3, except marihuana, is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $5,000.00, or both.

(c) A substance classified in schedule 4 or marihuana, is guilty of a felony, punishable by imprisonment for not more than 4 years, or a fine of not more than $2,000.00, or both.

(d) A substance classified in schedule 5, is guilty of a felony, punishable by imprisonment for not more than 2 years, or a fine of not more than $2,000.00, or both.

(3) A term of imprisonment imposed pursuant to subsection (2)(a)(i), (ii), or (iii) or section 7403(2)(a)(i), (ii), or (iii) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. An individual subject to a mandatory term of imprisonment under subsection (2)(a)(i), (ii), or (iii) or section 7403(2)(a)(i), (ii), or (iii) shall not be eligible for probation, suspension of that sentence, or parole during that mandatory term, except and only to the extent that those provisions permit probation for life.

Mich Public Act 368 of 1978 began as Mich House Bill 4190 of 1977. The House Legislative Analysis of the bill (as enrolled), dated May 17, 1978,[2] explained the problem the bill was intended to address:

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[2] The legislative analysis in Brief of Petitioner, Appendix p. 5, was dated March 16, 1977 and was prepared after passage in the House. The final bill dropped wiretapping as part of its package.

THE APPARENT PROBLEM:

Despite the efforts of law enforcement and drug education personnel, there has been a steady increase in narcotics traffic and drug abuse in Michigan, with a corresponding increase in drug-related crime. Some persons claim that the state has failed to stem drug traffic because the penalties for drug dealing are not severe enough, and law enforcement tools are inadequate. They contend that the potential for profit in drug dealing is so great that Michigan's present penalties pose little or no deterrent to would be violators, with lenient probation and parole policies weakening the threat of imprisonment still further. Police officers involved in narcotics investigation also complain that they are arresting the same persons over and over because convicted drug dealers are quickly returned to the illicit drug scene through probation and parole.

Since 1978, the Michigan Legislature has twice amended some of the penalties of MCL 333.7401 and MCL 333.7403. Mich Public Act 275 of 1987 and Mich Public Act 47 of 1988 took effect March 30, 1988 and changed some of the penalties. Notably, the mandatory minimum sentences for an amount of 225 grams or more, but less than 650 grams, was lowered to ten years from twenty. The mandatory minimum for an amount of 50 grams or more, but less than 225, was lowered to five years from ten. More significantly, the statutes were amended to allow the sentencing court to depart from the minimum terms specified for all the amounts *except 650 grams or more* "if the court finds on the record that there are substantial and compelling reasons to do so." MCL 333.7401(4); MCL 333.7403(3).

Finally, effective September 28, 1989, Mich Public Act 143 of 1989 changed the mandatory minimums for over 225 grams and over 50 grams back to 20 years and 10 years respectively. MCL 333.7401(2)(a)(ii) and (iii); MCL 333.7403(2)(a)(ii) and (iii) (West Supp. 1990)[3]

Over the years, the Michigan Court of Appeals has, as in the case at bar, sustained the imposition of the mandatory life imprisonment penalty for the manufacture, delivery or possession of 650 grams or more of the specified controlled substances. In *People v Romano*, 181 Mich App 204, 219; 448 NW 2d 795, 802 (1989), the Court summarized its repeated holdings:

> This court has upheld the constitutionality of M.C.L. § 333.7403; M.S.A. § 14.15 (7403), as well as the similar statute M.C.L. § 333.7401; M.S.A. § 14.15(7401), and repeatedly found that they did not constitute cruel and unusual punishment. See, e.g., [*People v Hamp*, 170 Mich App 24, 37 (1988)] 428 N.W.2d 16; *People v Leighty*, 161 Mich.App. 565, 583, 411 N.W.2d 778 (1987), lv. den. 430 Mich 895 (1988); *People v Acosta*, 153 Mich.App. 504, 515, 396 N.W.2d 463 (1986), lv. den. 428 Mich 865 (1987); *People v Matthews*, 143

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[3] The reason for this amendment was provided in the House Legislative Analysis of the enactment, Mich House Bill 4698 (as enrolled), dated July 28, 1989:

> The acts (Public Act 275 of 1987 and Public Act 47 of 1988) reducing specified minimum prison terms for illegal manufacture, delivery, or possession of larger quantities of narcotics and cocaine dangerously weakened the law governing controlled substances offenses. The bill would deter drug trafficking by increasing those mandatory minimum prison terms back up to their original levels.

> Mich.App. 45, 64, 371 N.W.2d 887 (1985); *People v Campbell*, 115 Mich.App. 369, 376-381, 320 N.W.2d 381 (1982), lv. den. 417 Mich 879 (1983). This Court has specifically considered and rejected the argument that life imprisonment for a conviction under M.C.L. § 333.7403(2)(a)(i); M.S.A. § 14.15(7403)(2)(a)(i) constitutes cruel and unusual punishment. *People v McCarty*, 113 Mich.App. 464, 317 N.W.2d 659 (1982), lv. den. 414 Mich 958 (1982).

In *People v McCarty*, 113 Mich App 464, 467-472; 317 NW 2d 659, 660-662 (1982), the Court reinstated the charge of possession of cocaine of 650 grams or more dismissed by the trial court:

> The United States Constitution prohibits cruel *and* unusual punishment. The Michigan Constitution prohibits cruel *or* unusual punishment. [Mich Const 1963, art 1, § 16] The trial court found that the penalty prescribed by the statute constituted cruel *and/or* unusual punishment. [emphasis in original]

The dominant test for determining if a given punishment constitutes cruel and/or unusual punishment was stated in *People v Lorentzen*, 387 Mich 167, 176, 194 N.W.2d 827 (1972), as whether "the punishment is in excess of any that would be suitable to fit the crime."

At first blush, we are inclined to agree with the trial court, but after closely examining the nature of the act, gleaning the overall legislative scheme from recent decisions and legislative comments, and after reviewing the penalties prescribed by other jurisdictions, we reach the following conclusions.

The questioned statute is an integral part of an overall legislative scheme designed to stamp out

illicit sale, possession, and use of certain dangerous and/or addictive substances by *providing graduated punishment* for offenses involving greater amounts of mixtures containing controlled substances. In finding that the graduated penalty provisions of the statute are not violative of the title-object clause and the equal protection and due process clauses, the Court, in *People v Lemble*, 103 Mich App 220, 222, 303 N.W.2d 191 (1981), stated:

> "The statutory scheme of the controlled substances portion of the health code punishes those found to be in possession of greater amounts of mixtures containing controlled substances with more severe penalties. We find that the legislative policies underlying criminal penalties – rehabilitation of the offender, society's need to deter the behavior in others, the prevention of the offender from causing injury to others – are achieved by this statute's graduated punishment. *People v Lorentzen*, 387 Mich 167, 194 N.W.2d 827 (1972). The penalties that may be imposed under this statute do not shock the judicial conscience in light of the gravity of the offenses."

* * *

We point out that before legislation is enacted various committees seek community input. The information obtained is examined closely to determine what laws need to be enacted to assist the community in its continuing battle against the illegal sale, possession and use of narcotics. The Legislature, because of the information it obtains and the studies it conducts, is better equipped than we, the courts, to draft laws to combat the serious problems of society.

It is our opinion that the mandatory life sentence provision for possession of 650 or more grams of a controlled substance was well-thought out by the Legislature, and premised upon two of the legislative policies underlying criminal penalties mentioned in *Lemble* which were: (1) the prevention of the offender from causing injury to others; and (2) society's need to deter the behavior in others.

The *amount specified in the statute, 650 or more grams, is a large quantity that suggests an amount involving major drug dealers.* Considering that the street value of 650 or more grams of cocaine is close to one million dollars, the number of lives affected by the possession, sale or use of this drug would be substantial. Certainly, in establishing the lifetime penalty provision for this offense, the Legislature sought to prevent an offender from causing further injury to others which would necessarily result from involvement with a large quantity of a controlled substance.

Moreover, it is apparent that deterrence of this conduct was a major factor in prescribing a mandatory life sentence for this offense. *Society's need to deter this behavior in others is warranted by the magnitude of problems involving drugs that society faces.*

After reviewing the statutes in other jurisdictions, comparatively the Michigan statute imposes the most severe penalty for possession of a controlled substance of the quantity involved in this case. However, the *Michigan statute is also the most progressive. It provides graduated penalties depending upon the amount possessed,* ranging from probation for possession of

a small amount to the lifetime imprisonment penalty for possession of an amount of 650 or more grams. Most other jurisdictions provide one penalty for all offenders.

On the bases of the gravity of the offense, the potential injury to others, and society's need to deter this behavior in others, as well as other reasons stated within this opinion, we must conclude that the information gathered by the Legislature required a severe penalty for this crime, and we at this juncture have not been able to determine that this legislation was unwise nor the penalty imposed cruel and/or unusual.

(footnotes omitted; emphasis added)

B. Proportionality In Non-Capital Cases

Petitioner relies upon this Court's proportionality analysis in *Solem v Helm*, 463 US 277 (1983) to argue that his sentence of mandatory life imprisonment is cruel and unusual under the Eighth Amendment. However, any analysis involving *Solem* must also take into consideration this Court's decisions in *Rummel v Estelle*, 445 US 263 (1980)[4] and *Hutto v Davis*, 454 US 370 (1982).

In *Rummel*, 445 US at 274, this Court held that a life sentence imposed under Texas's recidivist law upon a

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[4] In *Solem*, 463 US at 288, n. 13 and 463 US at 303, n. 32, this Court emphasized that it was not overruling *Rummel* but was, in fact, being consistent with it. The facts, however, were distinguishable because Rummel was eligible for reasonably early parole whereas Helm, at age 36, was sentenced to life with no possibility of parole.

defendant thrice convicted of property-related felonies did not constitute cruel and unusual punishment. The Court stated that as to its prior decisions applying the prohibition of cruel and unusual punishments:

> . . . one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.[11]

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[11] This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, post, at 288, if a legislature made overtime parking a felony punishable by life imprisonment.

Whereas a "bright line" can be drawn between the punishment of death and "the various other permutations and commutations of punishment short of that ultimate sanction," the line-drawing would be much more difficult for "any constitutional distinction" between different terms of years. *Id.* at 275. The Court pointed out that such basic line-drawing "is pre-eminently the province of the legislature" and reiterated Justice White's caution in *Coker v Georgia*, 433 US 584, 592 (1977) that the Court's Eighth Amendment judgments should neither be, nor appear to be, merely the subjective views of the individual Justices. *Id.* at 274 – 275.

In *Rummel* at 276, this Court recognized the societal interest involved in the punishment of recidivists:

> Thus the interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another person's property; it is in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts show that they are simply incapable of conforming to the norms of society as established by its criminal law.

Further, the Court stated:

> The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.
>
> Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction. *Id.* at 284-285.

The Court warned that under federalism there will always be one state that will have the distinction of treating particular defendants more severely than any other state, 445 US at 281 – 282:

> Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly

> would render Rummel's punishment "grossly disproportionate" to his offenses or to the punishment he would have received in the other States.
>
> * * *
>
> Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.[27]

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[27] The dissent draws some support for its belief that Rummel's sentence is unconstitutional by comparing it with punishments imposed by Texas for crimes other than those committed by Rummel. *Other crimes, of course, implicate other societal interests, making any such comparison inherently speculative.* Embezzlement, dealing in "hard" drugs, and forgery, to name only three offenses, could be denominated "property related" offenses, and yet each can be viewed as an assault on a unique set of societal values as defined by the political process. The notions embodied in the dissent that if the crime involved "violence," see post, 295-296, n 12, a more severe penalty is warranted under objective standards simply will not wash, whether it be taken as a matter of morals, history, or law. Caesar's death at the hands of Brutus and his fellow conspirators was undoubtedly violent; the death of Hamlet's father at the hands of his brother, Claudius, by poison was not. Yet there are few, if any, States which do not punish just as severely murder by poison (or attempted murder by poison) as they do murder or attempted murder by stabbing. The highly placed executive who embezzles huge sums from a state savings and loan association, causing many shareholders of limited means to lose substantial parts of their savings, has committed a crime very different

from a man who takes a smaller amount of money from the same savings and loan at the point of a gun. Yet rational people could disagree as to which criminal merits harsher punishment. By the same token, a State cannot be required to treat persons who have committed three "minor" offenses less severely than persons who have committed one or two "more serious" offenses. If nothing else, the three-time offender's conduct supports inferences about his ability to conform with social norms that are quite different from possible inferences about first- or second-time offenders.

In short, the "seriousness" of an offense or a pattern of offenses in modern society is not a line, but a plane. Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute

> for several separate felony convictions not involving "violence" violates the cruel-and-unusual-punishment prohibition of the Eighth Amendment. As Mr. Justice Frankfurter noted for the Court in *Gore v United States*, 357 US 386, 393 (1958), "[w]hatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy." (emphasis added)

Justice Powell in his dissent agreed that the States cannot be required to provide for uniform sentences, 445 US at 299, n. 19:

> A State's choice of a sentence will, of course, never be unconstitutional simply because the penalty is harsher than the sentence imposed by other States for the same crime. Such a rule would be inconsistent with principles of federalism. The Eighth Amendment prohibits grossly disproportionate punishment, but it does not

> require local sentencing decisions to be controlled by majority vote of the States.

In *Hutto v Davis*, this Court followed *Rummel* and upheld a sentence of two consecutive 20-year prison terms and two separate fines of $10,000.00 for convictions of possession with intent to distribute and distribution of approximately nine ounces of marihuana with a street value of about $200.00.

Justice Powell in concurring in the judgment "reluctantly" concluded *Rummel* was controlling. 454 US at 375. However, Justice Powell did concede that "under our system the limits of a prison sentence normally are a matter of legislative prerogative." *Id.* at 377.

Justice Brennan, with whom Justice Marshall and Justice Stevens joined, dissented and argued that *Rummel's* holding was rather narrow

> . . . in the context of Texas' habitual offender statute, the imposition of a life sentence on Rummel served the legitimate state interests of deterring recidivism and of segregating habitual offenders "from the rest of society for an extended period of time." [445 US] at 284.
>
> *Hutto v Davis*, 454 US 382.

Finally, in *Solem*, this Court for the first time found a sentence for a term of years to be grossly disproportionate to the crime and thus prohibited by the Eighth Amendment. Justice Powell, joined by the other dissenters in *Rummel*,[5] found that a life sentence without the

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[5] Justices Brennan, Marshall and Stevens.

possibility of parole for a seventh nonviolent felony[6] of uttering a "no account" check for $100.00 was significantly disproportionate to the crime and therefore prohibited by the Eighth Amendment. Justice Powell summarized at 463 US 290:

> In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.
>
> (footnote omitted)

In footnote 16 following this passage, Justice Powell stated in part:

> In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

When reviewing sentences, Justice Powell instructed that the courts should be guided by "objective factors" including: (a) the gravity of the offense and the harshness of the penalty; (b) the sentences imposed for other crimes in the same jurisdiction; and (c) the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 290-292. Justice Powell assumed that courts were competent to judge the gravity of an offense "at least on a

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[6] Alcohol was a contributing factor in each of the offenses. 463 US at 280.

relative scale." Comparisons could be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. *Id.* at 292.

C. Solem Analysis

Respondent submits that in the case at bar Petitioner's life sentence is not so grossly disproportionate as to be cruel and unusual under the Eighth Amendment. Unlike in *Rummel* where the Court focused on and deferred to society's interest in punishing recidivists, in *Solem* the Court focused on the principal felony "one of the most passive felonies a person could commit." 463 US at 296 quoting *State v Helm*, 287 NW 2d 497, 501 (S.D., 1980) (Henderson, J., dissenting). See also: 463 US 296, n. 21.[7] Whether the focus is on Michigan's paramount interest in stamping out illegal drug trafficking or in examining the gravity of Petitioner's crime, the punishment of mandatory life imprisonment cannot be called grossly or significantly disproportionate.

The Michigan Legislature in 1978 enacted the mandatory life term for possession of 650 grams or more of cocaine because of an ever-increasing spiral of drug traffic, drug abuse and drug-related crime. Today, the situation appears to be even worse. According to President George Bush, the top priority for the United States is the

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[7] In *Solem*, Justice Powell did not concern himself with the legislature's prerogative apparently because South Dakota's recidivist statute made the imposition of life imprisonment discretionary. *Id.*, at 299, n. 26. Once a sentence of life imprisonment was meted out, however, the person so sentenced was not eligible for parole. *Id.* at 282.

"war" on illegal drugs. In that fight, the federal government will spend $10.6 billion annually. Deaths from cocaine and heroin abuse are increasing. In urban areas such as Detroit and Washington, D.C., the pathologies related to drug abuse – violent crimes and property crimes, AIDS, crack babies – are most pronounced. Urban murders, many of them drug-related, are likely to reach record numbers this year. In Michigan, an estimated 67,000 persons - 7.3 of every 1,000 state residents – use cocaine at least once a week.[8] In Detroit, one of the areas of the United States under heavy siege from crack cocaine since 1985, the first large group of crack-exposed 5-year-olds started kindergarten this fall. They suffer from an array of neurological, emotional and learning problems.[9]

In *Young v Miller*, 883 F2d 1276, 1285 (6th Cir., 1989), the Sixth Circuit Court of Appeals concluded under a *Solem* proportionality analysis that Michigan's mandatory term of life imprisonment for a first offender for possession with intent to deliver of 650 grams or more of heroin was not cruel and unusual:

> [E]ven assuming Michigan has the toughest drug law of all the states, the question, as we see it, is whether the Michigan statutory scheme is totally out of line with these other states. Clearly, most of the states listed above prescribe heavy penalties for drug trafficking, albeit with

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[8] "War On Drugs", *Detroit Free Press*, September 8, 1990, at 6A.

[9] "Crack Casts Pall Over Kindergarten", *Detroit Free Press*, August 8, 1990 at 1A.

> much more consideration for the criminal background and possibility of rehabilitation of the offender. In many of these states, the sentencing judge has the discretion to impose a life sentence or a significant term of years for drug traffickers. Additionally, given the present political climate, it may well be that many of these states will change their penal codes to provide for even stiffer sentences for drug offenders in the future. Thus, notwithstanding its harshness, we believe Michigan's drug law is in the range of the drug laws of other states.

Further, the Court stated:

> Considering the severity of the crime, we refuse to interfere with Michigan's efforts to punish major drug traffickers to the fullest extent of the law, even those who are first offenders. *Id.*

In the course of its *Solem* analysis, the Court remarked on the seriousness of the defendant's crime:

> We begin our *Solem* analysis with the first and primary factor – the gravity of the offense and the harshness of the penalty. Petitioner Young was convicted of possession with intent to deliver 650 grams or more of heroin. We have little doubt that her crime is one of the gravest a person can commit today. Young possessed with intent to distribute approximately 1300 grams of heroin (almost twice the amount upon which the penalty could be predicated), an extremely addictive narcotic. The ripple effect on society of such a large quantity of heroin is staggering to contemplate. Indeed, as one court has aptly observed: *"Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image – others who create others still, across our land and down our generations,*

> *sparing not even the unborn." Terrebonne v Butler,* 848 F.2d 500, 504 (5th Cir. 1988) (en banc), *cert. denied,* ___ US ___, 109 S. Ct. 1140 (1989). We thus consider the crime that Young committed to be very serious. (emphasis added)

In his dissent in *Rummel,* 445 US at 295, n. 12, Justice Powell had acknowledged that drug cases might not be easily compartmentalized under his proportional analysis:

> I do not suggest that all criminal acts may be separated into precisely identifiable compartments. A professional seller of addictive drugs may inflict greater bodily harm upon members of society than the person who commits a single assault. But the difficulties of line-drawing that might be presented in other cases need not obscure our vision here.

The point is that in Michigan by making the sentence mandatory in 1978 the Legislature made clear the gravity with which it viewed the dealing in large quantities of drugs. Subsequently, in 1987 and 1989 when it eased and then tightened the mandatory penalties for less than 650 grams of schedule 1 and 2 controlled substances, it did not change the penalty for 650 grams or more. Thus, unlike in *Solem* where life imprisonment was discretionary with the sentencing court, the Michigan Legislature made its interest crystal clear. As such, this Court should as in *Rummel,* which after all is still viable, defer to the legislature's definitive statement of the public interest.[10] Michigan's controlled substance statutes have a rational

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[10] Note, *Solem v Helm: Extension of Eighth Amendment Proportionality Review to Noncapital Punishment,* 69 Iowa L R 775, 782-783, 793-794 (1984).

basis to Michigan's interests in eliminating the scourge of large-scale drug trafficking.[11] See: *Carmona v Ward,* 576 F2d 405, 410-412 (1978) *cert den* 439 US 1091 (1979).

Petitioner cites eleven other states that provide for possible life sentences, but with parole, for similar offenses. Some, however, do have mandatory minimums ranging from ten to thirty years. (Brief of Petitioner, pp 42-43). Petitioner received his sentence at age 42. Under Standard Mortality Tables, his life expectancy would be 30.41 years. MCL 500.834 (West Supp. 1990, p. 37). Although the sentence herein may be considered harsh, it is not out of line with the range available. In fact, it is similar to the 40-year sentence upheld in *Hutto v Davis* which involved nine ounces of marihuana. As noted by Justice Powell in his dissent in *Rummel,* 445 US 299, n.19, the principle of federalism would not allow the striking down of a sentence just because it is the most severe among the states. The question has to be whether it is

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[11] Built-in to Michigan's statute prohibiting possession is a clear legislative presumption that he who possesses a large amount of narcotics should be dealt with in the same way as a seller. *Cf., People v Broadie,* 37 NY2d 100; 371 NYS2d 471; 332 NE 2d 338, 343 (1975) *cert. den.* 423 US 950 (1975). Such is reasonable especially in Petitioner's case where the 672.5 grams of cocaine he was transporting was pure and worth between $67,000.00 and $100,000.00. Petitioner was arrested with the standard tools of the drug dealer: ten small packets of cocaine, three little vials of cocaine, a beeper, a coded address book, some marihuana cigarettes, assorted pills including Percodan and approximately $3,500 in cash.

grossly disproportionate. Respondent submits that given the evil being addressed, it is not.

Under the second *Solem* factor of examining sentences for other crimes in the same jurisdiction, in *Young v Miller*, 883 F2d at 1283, the Sixth Circuit found no gross disproportion:

> Large-scale drug traffickers (defined by the Michigan legislature as those persons possessing 650 grams of Level I narcotics or more) are treated the same as first-degree murderers (Mich. Comp. Laws § 750.316). Both receive mandatory life imprisonment without parole, without regard to the criminal record or rehabilitative potential of the offender. The Michigan Penal Code also provides for a mandatory life sentence with possibility of parole for treason (§750.544). It authorizes discretionary life sentences with possibility of parole for various other crimes such as second-degree murder (§750.317), attempted murder (§750.91), causing death by explosives (§750.327), armed robbery (§750.529), first-degree criminal sexual conduct (§750.520b(2)), and kidnapping (§750.349). *In its sentencing scheme, the Michigan legislature has recognized the devastating consequences of large-scale drug trafficking by treating that crime as being more serious than many of the violent crimes.* It has chosen to take the drug problem in its state "by the horns" by going after the major sources of illegal drugs. By imposing such a harsh penalty, it obviously hopes to provide a strong deterrent to those who would deal illegal drugs and possibly prevent some of the violent crimes often associated with drug trafficking. While one might question the trial court's lack of discretion in the sentencing process, we certainly do not believe that the punishment imposed for large-scale drug traffickers is in all cases inappropriate. (emphasis added)[12]

Also, as pointed out in *McCarty*, 317 NW2d at 467-472, the drug statutes provide for graduated punishment.

D. Individualized Sentencing

Petitioner attempts to analogize to this Court's capital punishment cases mandating individualized sentencing. Such an analogy is misplaced, however. Justice Powell in his dissent in *Rummel*, 445 US at 301, allowed that, "Of course, the Constitution does not bar mandatory sentences."

In *Lockett v Ohio*, 438 US 586, 604-605 (1978) the plurality opinion makes clear the profound difference between the imposition of death and all other noncapital sentences:

> We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the

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[12] Although a prisoner might technically be eligible for parole after ten years he cannot be paroled if there is a written objection by the sentencing judge, or his successor in office. MCL 791.234(4)(b). Also, for the mandatory life sentences, there is the possibility of a governor's reprieve, commutation or pardon. MCL 791.244.

conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques – probation, parole, work furloughs, to name a few – and various postconviction remedies, may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.[13]

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[13] Sentencing in noncapital cases presents no comparable problems. We emphasize that in dealing with standards for imposition of the death sentence we intimate no view regarding the authority of a State or of the Congress to fix mandatory, minimum sentences for noncapital crimes.

This Court's recent decision in *Mistretta v United States*, 488 US ___; 109 S Ct 647 (1989) upheld the limiting by Congress of judicial discretion as to sentencing. In *Walton v Arizona*, 497 US ___; 110 S Ct 3047, 3076 (1990), Justice Blackmun's dissent (joined in by Justices Brennan, Marshall and Stevens), after reiterating the "qualitative difference" between death and all other penalties, pointed out the practical distinction for noncapital sentences:

> In noncapital cases, of course, the States are given broad latitude to sacrifice precision for predictability by imposing determinate sentences and restricting the defendant's ability to present evidence in mitigation or excuse.

In *United States v Belgard*, 894 F2d 1092, 1100 (9th Cir., 1990), the Court explained:

> Belgard also attacks the formulation of the Sentencing Guidelines in the area of probation because they curtail the authority of the district judges to individualize sentences. That attack cannot succeed.
>
> First, the Constitution does not require individualized sentences in non-capital cases. *United States v White*, 869 F2d 822, 825 (5th Cir.), *cert. denied*, ___ US ___, 109 S Ct 3172, (1989). *See also Mistretta*, 488 US at ___, 190 S.Ct. at 650 ("the scope of judicial discretion with respect to a sentence is subject to congressional control"); *Lockett v Ohio*, 438 US 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) ("the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes"). Congress has the power to enact mandatory and determinate sentencing laws and to completely divest the courts of their sentencing discretion, and has exercised this power. *Lockett*, 438 US at 603-05, 98 S Ct at 2965. *See also United States v Grayson*, 438 US 41, 45, 98 S Ct 2610, 2613, 57 L.Ed.2d 582 (1978) (early practice was for Congress to prescribe specific sentence).

For this Court to try to weigh Petitioner's individual characteristics to determine whether his sentence was proper would be fruitless given that there was no extensive development in the trial court of all mitigating and aggravating factors which might have been considered. Such a review would entail even more judicial line-drawing.

E. Solem v Helm Should Be Overruled

As made out in the vigorous dissent in *Solem* by former Chief Justice Burger, joined by Justices White, Rehnquist and O'Connor, the *Solem* majority launched into "uncharted and unchartable waters." 463 US at 314. As Chief Justice Burger concluded:

> The Court's traditional abstention from reviewing sentences of imprisonment to ensure that punishment is "proportionate" to the crime is well founded in history, in prudential considerations, and in traditions of comity. Today's conclusion by five Justices that they are able to say that one offense has less "gravity" than another is nothing other than a bald substitution of individual subjective moral values for those of the legislature. Nor, as this case well illustrates, are we endowed with Solomonic wisdom that permits us to draw principled distinctions between sentences of different length for a chronic "repeater" who has demonstrated that he will not abide by the law. 463 US 314.

The *Solem* proportionality test has been criticized by many as nonobjective and readily manipulable.[13] The gravity of the offense compared to the harshness of the penalty begs the question of proportionality as it suggests no truly objective factors.[14] The *Solem* formulation does not take into account crimes which may not be violent but which society in general believes harmful such as fraud or drug crimes.[15] Applying the *Solem* standard in

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[13] See: Note, *Cruel and Unusual Punishment and Sodomy Statutes: The Breakdown Of the Solem v Helm Test*, 56 U Chi L R 367, 377 and commentators cited at 377, n. 58.

[14] 56 U Chi L R at 377.

[15] *Id.* at 378-379.

the case at bar reveals the inadequacy of the criteria for weighing the gravity of an offense provided in *Solem*.

Part of the reason Helm's sentence was overturned whereas Rummel's was not may have been that Helm's sentence shocked the conscience. He appeared to be an alcoholic and could not even fully recall his bad-check offense for purposes of providing a factual basis for his guilty plea. Helm pleaded guilty to the habitual charge over his attorney's objection and then waived his right to a presentence investigation and received immediate sentencing. The sentencing judge appeared confused as to whether Helm would be eligible for parole.[16] Petitioner Harmelin concedes his crime was much more serious.

Although in the years since the Court's ruling in *Solem* there have been few reversals of sentences on the basis of the *Solem* standard, the point is that numerous minor sentences had to be reviewed on appeal because *Solem* invited such analysis. *See for example: United States v Sullivan*, 895 F2d 1030 (5th Cir., 1990); *United States v Benefield*, 889 F2d 1061, 1063-1065 (11th Cir., 1989); *United States v Savage*, 888 F2d 528 (7th Cir., 1989) *reh den* 894 F2d 1495 (1989); *State v Elbert*, 125 NH 1; 480 A2d 854, 862 (1984) (Souter, J.).

As noted in *Cabana v Bullock*, 474 US 376, 386 (1986) (plurality), the type of Eighth Amendment proportionality inquiry undertaken in *Solem* involves case-by-case, totality-of-the-circumstances decision-making. Justice Scalia has noted such a test for the appellate judge relegates him or her to the less exalted role of finder of

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[16] 69 Iowa L R *supra* at 777-778.

fact as opposed to determiner of law. This in turn facilitates judicial arbitrariness.[17]

Given the scourge of illegal drugs, the Michigan Legislature's answer to the problem was not disproportionate to the gravity of the crime. *See: United State v Bernal*, 884 F2d 1518, 1520-1521 (1st Cir., 1989); *United States v Martorano*, 866 F2d 62, 69-70 (3rd Cir., 1989) *cert den* ___ US ___; 110 S Ct 1128 (1990); *United States v Aiello*, 864 F2d 257, 265 (2nd Cir., 1988); *United States v Stewart*, 820 F2d 1107, 1108 (9th Cir., 1987) (Kennedy, J.) *cert den* 484 US 867 (1987). In that regard, it is the legislature, composed of elected representatives of the people from a diverse cross-section of the jurisdiction, that is best equipped to draw moral lines and measure public sentiment. It is very difficult to compare crimes that may implicate different societal interests. To not allow deference to the Michigan Legislature's determination of the gravity of drug crimes and the severity of the punishment is to trample on the fundamental concepts of federalism.[18]

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[17] Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L R 1175, 1180-1182 (1989).

[18] 56 U Chi L R at 380-396.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Michigan Court of Appeals and leave intact MCL 333.7403.

Respectfully submitted,

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